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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933. No. 329.

C. F. ROUTZAHN, COLLECTOR OF INTERNAL REVENUE OF THE UNITED STATES FOR THE EIGHTEENTH DISTRICT OF OHIO, Petitioner,

v.

WILLARD STORAGE BATTERY COMPANY, a corporation, Respondent.

BRIEF FOR THE RESPONDENT.

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IN THE

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OCTOBER TERM, 1933. No. 329.

C. F. Routzahn, Collector of Internal Revenue of the United States for the Eighteenth District of Ohio, Petitioner,

v.

Willard Storage Battery Company, a Corporation, Respondent.

BRIEF FOR THE RESPONDENT.

OPINIONS BELOW.

The opinion of the District Court for the Northern District of Ohio (R. 32) is not reported.[1] The opinion of the Circuit Court of Appeals (R. 154) is reported in 65 F. (2d) 89.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered May 9, 1933 (R. 154). Jurisdiction is

[1] An opinion overruling motions to dismiss, not in the record, is not officially reported but may be found in 8 Am. Fed. Tax Reports, 11274. For convenience it is reprinted in the appendix to this brief, p. A-11.

invoked by Petitioner under Section 240 (a) of the Judicial Code.

QUESTIONS PRESENTED.

Stated in Brief for the Petitioner.

STATUTES AND REGULATIONS INVOLVED.

Section 900, Revenue Act of 1921, 42 St. L. 227 (Appendix, p. A-1). Section 600, Revenue Act of 1924, 43 St. L. 253 (Appendix, p. A-1). Section 424, Revenue Act of 1928 (Appendix, p. A-3). Treasury Regulations 47, Art. 15, revised January, 1922 (Appendix, p. A-8). Treasury Regulations 47, Art. 16, revised August, 1924 (Appendix, p. A-9). Treasury Regulations 74, Art. 1255, 1928 (Appendix, p. A-10). Section 3226 of the revised Statutes (Appendix, p. A-5).

STATEMENT OF THE CASE.

In addition to the facts set forth in the Statement of the Case in Petitioner's Brief, the following proceedings in the case prior to the commencement of the five actions at law are material to the consideration of the question presented under Section 424 of the Revenue Act of 1928.

On October 5, 1926, Respondent filed its Claims for Refund of manufacturers' excise tax paid on electric storage batteries (R. 5, 14, 23, 90, 97, 105,

111, 118, 126, 132, 138) for each year during the taxable periods from January 1922 to February 1926, inclusive, in the amounts of $295,344.49, $243,047.28, $188,448.16, $175,875.19 and $24,971.20, respectively.

On October 29, 1926, Respondent filed its amended Claims for Refund, No. 700, No. 701, No. 702, No. 703, No. 704 (R. 7, 14, 23, 92, 97, 106, 112, 120, 126, 131, 139) of manufacturer's excise tax so paid on electric storage batteries for each year during the taxable periods from January 1922 to February 1926, inclusive, in the amounts of $295,049.71, $249,275.32, $189,853.88, $173,934.45, and $41,764.37, respectively, which were duly rejected by the Commissioner of Internal Revenue on June 21, 1927 (R. 9, 14, 23, 93, 97, 108, 112, 122, 126, 135, 139).

The date of enactment of the Revenue Act of 1928 was May 29, 1928.

These five actions at law were instituted in the District Court of the United States for the Northern District of Ohio, Eastern Division, on May 31, 1929, against the Collector of Internal Revenue.

SUMMARY OF ARGUMENT.

I.

(1) Section 424 of the Revenue Act of 1928 is an administrative provision which applies to final repayment of taxes adjudged to have been illegally assessed and collected, rather than a prerequisite to suit and therefore a limitation upon a right of action as Petitioner claims; (2) that if the Petitioner's

contention is correct then the Section is unconstitutional; and (3) that whether it is an administrative provision or a limitation upon a right of action it is unconstitutional because it destroys a pre-existing right and creates the effect of imposing a retrospective tax liability where none existed prior to the passage of the Act.

II

(1) That in determining whether an article is a "part" for an automobile under the Revenue Acts of 1921 and 1924, the fact of chief or principal use has no application where the article both before and after the passage of the Act was and is equally adapted for a great many other uses; was in wide, common and general use for a great many other purposes, such other uses being not incidental to the use on automobiles, and the article having been found not to be primarily adapted for use on automobiles; (2) that the Revenue Act of 1932, imposing an excise tax on storage batteries suitable for use on automobiles, is to be construed as imposing a new tax upon storage batteries which were not taxable under the Revenue Acts of 1921 and 1924, and not as evidencing an intention under the earlier Acts to make them taxable; and (3) the Court has no right in construing a tax Act to inquire into the intention of Congress, but is bound by the plain meaning in their ordinary sense of the words used, and must resolve any doubt in favor of the taxpayer.

ARGUMENT.

I.

1. AS TO PETITIONER'S CONTENTION THAT SECTION 424 CONSTITUTES A LIMITATION UPON A RIGHT OF ACTION.

The case at bar differs radically from the case of Jefferson Electric Manufacturing Company in that (*a*) in the latter case the suit is against the United States, while the suit at bar is against the Collector, and (*b*) the claims for refund filed by Respondent in accordance with Section 3226 of the Revised Statutes (A 5), were rejected on June 21, 1927 (R. 23), almost one year prior to the passage of the Revenue Act of 1928, and therefore at the date of the passage of that Act, the Respondent had a little over one year within which to bring its suit before the running of the Statute of Limitations; and (*c*) in this case the question of whether or not the taxes had been collected from the purchaser, or whether or not the Respondent had filed the bond provided in Section 424 was not raised.

The Petitioner's contention as set forth in his brief in the case at bar and in his brief in the Jefferson case is that the provisions of Section 424 of the Revenue Act of 1928 constitute a limitation upon a right of action to recover taxes illegally assessed and collected, and under color of this contention maintains:

> 1. That the making of refunds under the Section was vested in the exclusive discretion of the

Commissioner of Internal Revenue without right of review in the Courts.

2. That the respondent, in a suit against the Collector to recover taxes illegally assessed and collected, was under the necessity of proving that the amount of the taxes had not been collected from the purchaser, or if so collected, had been repaid to him, or that the bond required by the Section had been filed.

To support his construction of Section 424 involves a distortion of the language used in order, at best, to render it susceptible of an inference which cannot be drawn from the plain, unambiguous and ordinary meaning of the words used. It is submitted that it is a fundamental rule in the construction of Statutes that their words are presumed to be used in their ordinary sense, and with the meaning commonly attributable to them:

DE GANAY v. LEDERER, 250 U. S. 376; 63 L. Ed. 1042 (1919);

ENDLICH'S INTERPRETATION OF STATUTES, page 4.

It is equally well settled that in every case of doubt, every reasonable inference, every doubt, and every statutory ambiguity must be resolved in favor of the taxpayer and against the Government:

GOULD v. GOULD, 245 U. S. 151, 62 L. Ed. 211 (1917);

UNITED STATES v. MERRIAM, 263 U. S. 179, 68 L. Ed. 240 (1923).

The Petitioner's contention that the Section vests in the Commissioner of Internal Revenue the exclusive determination as to the making of refund without right of review by the Courts is so palpably wrong as to require but little discussion. This construction of the Section would be such an encroachment by the Legislative branch of the Government upon the Judicial power as to render it clearly a violation of Section 1 of Article III of the Constitution:

OHIO VALLEY WATER CO. v. BEN AVON BOROUGH, 253 U. S. 287; 64 L. Ed. 908 (1920);

OWENSBORO v. LUCAS, 18 F. (2d) 798 (1927);

ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF THE LAW BY JOHN DICKINSON, Vol. II, p. 271.

Furthermore, such a construction obviously violates the guarantee of the due process clause of the Fifth Amendment to the Constitution:

TUMEY v. OHIO, 273 U. S. 510; 71 L. Ed. 749 (1927);

PHILLIPS v. COMMISSIONER, 283 U. S. 589; 75 L. Ed. 1289 (1931).

The Petitioner further contends that if the foregoing construction which he places upon Section 424 is wrong, then that the Court had no jurisdiction to entertain the suit against the Collector because Respondent did not plead and prove the fact that the tax illegally collected had not been paid by the

purchaser, or, if paid, had not been returned to him, or that the Commissioner had certified to the proper disbursing officer that the bond described in the Section had been filed. This construction is invoked by reason of the contention that by Section 424 Congress meant to prohibit refunds of taxes illegally collected, if, as the Petitioner phrases it, the plaintiff, although not liable for the tax, "did not bear the economic burden of the tax." This construction is, at best, an inference to be drawn from the language of the Section, which can only be reached by imposing a strain upon the words used, and is, of course, wholly inconsistent with his first suggested construction. He argues that the Court might render judgment against the Collector in the case at bar (against the United States in the Jefferson case) and that the judgment of the Court might be nullified (that is, satisfaction of the judgment by payment might be refused), by the administrative determination of the Commissioner that an amount equal to the taxes had been collected from the purchaser. He states that in such event no case or controversy in the constitutional sense with reference to the exercise of judicial power is presented, and therefore, the Court is without jurisdiction. The Petitioner relies upon the case of GORDON v. UNITED STATES, 2 Wall, 561, but that case was quite different. The Act of Congress of 1863, the construction of which was before the Court, endeavored to transform the Court of Claims, which it had created in 1855 merely to investigate claims against

the United States, into a court in the judicial sense of the term, but because it provided that no final judgment should be paid unless the Secretary of the Treasury first "estimated" for an appropriation, this Court held that no judicial power had been conferred upon it, and that its judgments were merely opinions. The case at bar, however, is in a constitutional Court, as distinguished from a legislative Court, and is against the Collector, and not against the United States, and in exercising the judicial function it is not necessary, in order to constitute a judicial judgment, that there should be power to issue formal execution to carry the judgment into effect:

FIDELITY NATIONAL BANK v. SWOPE, 274 U. S. 123; 71 L. Ed. 959 (1927);

OLD COLONY TRUST CO. v. COMMISSIONER, 279 U. S. 716; 73 L. Ed. 918 (1929);

NASHVILLE v. WALLACE, 288 U. S. 249; 77 L. Ed. 444 (1933).

No process can issue against the United States upon judgments of the Court of Claims, and yet actions in that Court are "cases" or "controversies" in the constitutional sense:

UNITED STATES v. JONES, 119 U. S. 477; 30 L. Ed. 440 (1886);

NASHVILLE C. & ST. L. R. Co. v. WALLACE, 288 U. S. 249; 77 L. Ed. 448 (1933).

In the other three cases, namely *In re* SANBORN, 148 U. S. 222, 37 L. Ed. 429 (1893), HAYBURN'S CASE, 2 Dall. 409, UNITED STATES v. FERREIRA, 13 How. 40, there was no suit or controversy in the lower Court. In one case, the Court below by consent rendered an opinion for the guidance of an administrative officer of the Government, and in the other two cases, the Judges who rendered opinions made it perfectly clear that they were not acting as Judges, nor was the Court acting as a Court, but that they assumed the burden of ascertaining certain facts which had been imposed by Congress as commissioners and not as Courts.

The Petitioner relies upon two decisions of this Court to sustain his construction that Section 424 creates a limitation upon a right of action, but neither of them can be so construed. In one of them, WILLIAMSPORT WIRE ROPE COMPANY v. UNITED STATES, 277 U. S. 551; 72 L. Ed. 985 (1928), the provision of the appropriate Revenue Act was in relief of the taxpayer, and there was no question left to the determination of the Commissioner as to the legality of the tax. The sole question left to him was to ascertain from tax returns from other taxpayers in his possession, in a business similar to that of the taxpayer, whether the taxes properly assessed were proportionately grossly greater than those properly assessed against his competitors. This was information solely in the knowledge of the Commisisoner,

and because the Act in question was a relief Act, as distinguished from an Act which attempted to take away a right, it was held that the delegation to the Commissioner to ascertain facts which were in his exclusive knowledge was proper and did not encroach upon the judicial power of the United States, and the administrative delegation to the Commissioner was a proper one. The other case cited by the Petitioner, GRAHAM v. GOODCELL, 282 U. S. 409; 75 L. Ed. 415, (1931), does not support his contention. In that case this Court decided that Congress had power to place a limitation upon a right of action solely in the course of correcting an administrative mistake, where the substantive question of the validity of the taxes was not, nor could not, be in question, but reiterated the general rule that a right of action could not be taken away by a Statute which retroactively imposed a liability where none existed prior to the enactment. The Court said:

> "It is apparent, as the result of the decisions, that a distinction is made between a bare attempt of the legislature retroactively to create liabilities for transactions which, fully consummated in the past, are deemed to leave no ground for legislative intervention, and the case of a curative statute aptly designed to remedy mistakes and defects in the administration of government where the remedy can be applied without injustice. Where the asserted vested right, not being linked to any substantial equity, arises from the mistake of officers purporting

to administer the law in the name of the government, the legislature is not prevented from curing the defect in administration simply because the effect may be to destroy causes of action which would otherwise exist. * * *

"If the Congress did not have the authority to deal by a curative statute with the taxpayers' asserted substantive right, in the circumstances described, it could not be concluded that the Congress could accomplish the same result by denying to the taxpayers all remedy both as against the United States and also as against the one who committed the wrong."

Furthermore if the Petitioner's contention is correct,—that the determination of the Commissioner as to the collection of the tax was a prerequisite to the bringing of suit against the Collector,—then it might well happen that even if the Commissioner should determine that the taxes had not been collected from the purchaser, the Respondent's right of action might be barred by the running of the Statute of Limitations for the reason that his claim was rejected by the Commissioner on June 21, 1927, and he then had two years within which to bring suit against the Collector in accordance with the provisions of Section 3226 of the Revised Statutes (A-5), and if, when the Revenue Act of 1928 was passed on May 29, 1928, he was compelled to file a new Claim for Refund,—which is the only method known to the Respondent to invoke the determination of such a question,—then more than sixty per cent of his

claim would have been barred by the Statute, which prohibits the filing of a Claim for the refund of taxes paid more than four years prior to the filing of the Claim.

If, therefore, the effect of the statute is to create a new limitation upon actions without affording a reasonable time for bringing the action before the bar takes effect, this would amount to a denial of justice and make the act unconstitutional. The section did prevent the refund of judgments of the court unless the suit had been instituted more than thirty days prior to its passage, because the date of the passage of the Revenue Act of 1928 was May 29, 1928, and the limitation for the bringing of actions was April 30, 1928.

KOSHKONONG v. BURTON, 104 U. S. 668, 26 L. Ed. 886 (1881).

NOTE—8 AM. & ENG. ANN. CAS. p. 525.

The Petitioner attempts to answer this question by pointing out that the same provisions as in Section 424 of the Revenue Act of 1928 had previously appeared in the Deficiency Appropriation Acts of February 28, 1927, (44 Stat. p. 1261), of December 22, 1927, (45 Stat. 30), and of March 5, 1928, (45 Stat. 169). All of these Acts were for the appropriation of moneys and no attempt was made in them to deal with a right of action. If the provisions of Section 424 are construed as a limitation upon a right of bringing action, the origin of this limitation is clearly in Section 424 of the Revenue Act of 1928.

The limitations in the Appropriation Acts referred to dealt only with the disposition of the moneys appropriated therein, and cannot create a limitation upon a substantive right.

No matter what interpretation is given to Section 424, and especially as an answer to Petitioner's contention that submission to the Commissioner of the question as to whether or not the taxes had been paid by the purchaser is a prerequisite to suit, Respondent points out that the Commissioner, under the decision of this Court, is bound to find that the taxes were not paid by the purchaser: LASH'S PRODUCTS CO. v. UNITED STATES, 278 U. S. 175; 73 L. Ed. 251 (1929).

2. RESPONDENT CONTENDS THAT SECTION 424 IS AN ADMINISTRATIVE PROVISION WHICH APPLIES ONLY TO FINAL REPAYMENT.

The Respondent's contention is that Section 424 is an administrative provision and applies solely to "repayment" and not to a right of action. This is the ordinary meaning of "refund" and, given this meaning, it has perfect application to final repayment when a Claim for Refund upon the judgment is presented to the Commissioner. This is the interpretation which has been placed upon the Section by every Court in which the question has been raised, excepting in the District Court of Texas in the case of TWENTIETH CENTURY MANUFACTURING CO. v.

HOPKINS (unreported), cited in Petitioner's brief in the Jefferson case, and by thus translating the words used into their plan, unambiguous and obvious meaning, no necessity arises to resort to a distortion in order at best to raise an inference as to an intent of Congress which does not appear from the phraseology.

Remembering that the suit at bar is against the Collector to recover taxes illegally assessed and collected, it may be of interest to note the procedure which must be followed with reference to the correct application of Section 424. At the inception of the suit the United States has no immediate interest in it, except that by Section 3226 of the Revised Statutes, as a prerequisite to suit, the plaintiff must have filed with the Commissioner a Claim for Refund apprising him of the grounds for the claim. If the Commissioner rejects it, or if he does not act for six months, a suit must be brought within two years from the date of rejection, or from the expiration of the period of six months. At the conclusion of the trial the Court may, if the facts warrant, make a Certificate of Probable Cause, which has the effect of converting the judgment against the Collector into the nature of a claim against the United States: FLANDERS v. SEELYE, 105 U. S. 718 (1881). When the judgment has become final the plaintiff must present to the Commissioner a "Claim for Refund" upon the judgment in accordance with TREASURY REGULATIONS No. 74 (1928) ARTICLE 1255 (Appendix, p. A-10). It is to this "refund" which Section 424 has perfect applica-

tion. It is clear, therefore, that Congress intended this provision to apply as an administrative act after the judgment as to illegality of collection had been made. This was the view taken by the United States Circuit Court of Appeals for the Third Circuit in McCaughn v. Electric Storage Battery Company, 63 Fed. (2d) 715 (1933), from which no appeal was taken by the government, and is apparently the view of the Treasury Department as expressed by the Petitioner in his brief which states that payment of the judgment in that case has been withheld and the taxpayer has been asked to satisfy the Commissioner that an amount equal to the taxes was not paid by the purchaser.

3. SECTION 424 IS UNCONSTITUTIONAL IN ITS ENTIRETY, NO MATTER WHETHER CONSTRUED AS A LIMITATION UPON A RIGHT OF ACTION OR AS AN ADMINISTRATIVE PROVISION.

Whether Section 424 is construed as a limitation upon a right of action or as an administrative provision, the inevitable result is that it deprives Respondent of his right to recover taxes which were illegally assesed and collected from him. It will be borne in mind that at the time of the passage of the Revenue Act of 1928 the Respondent had a right at common law and by statute to sue the Collector personally for his illegal acts in requiring payment of a tax upon an article which was not subject to tax;

SAGE v. UNITED STATES, 250 U. S. 33; 63 L. Ed. 828 (1919);

SMIETANKA v. INDIANA STEEL COMPANY, 257 U. S. 1; 66 L. Ed. 99 (1921).

By the filing of the Certificate of Probable Cause, the Collector is relieved of personal liability for the payment of the judgment, and the judgment is converted into the nature of a claim against the United States;

FLANDERS v. SEELYE, *supra,* and

SEC. 989, REVISED STATUTES (Appendix, page A-4).

Thus the right of a private party to recover money due to him from the Collector is taken away and the right of presenting a claim on the judgment to the United States for payment has been substituted therefor. Congress, however, by the enactment of Section 424, now attempts to take away all existing remedies for the enforcement of the right to recover money due when the Act was passed. This attempt is clearly unconstitutional and void under the Fifth Amendment to the Constitution in that it deprives a private party of all existing remedies for the enforcement of an existing right which the Congress has no power to destroy;

UNITED STATES v. KLEIN, 13 Wall. 128; 80 U. S. 128 (1871);

POINDEXTER v. GREENHOW, 114 U. S. 270; 29 L. Ed. 185 (1844);

DEN v. HOBOKEN LAND AND IMPROVEMENT COMPANY, 59 U. S. 286; 15 L. Ed. 372 (1856) *(obiter dicta)*;

ETTOR v. TACOMA, 228 U. S. 148; 57 L. Ed. 773 (1912);

PACIFIC MAIL S. S. Co. v. JOLIFFE, 2 Wall. 450; 17 L. Ed. 805 (1864);

FORBES PIONEER BOAT LINE v. BOARD OF COMMISSIONERS OF EVERGLADES DRAINAGE DISTRICT, 258 U. S. 338; 66 L. Ed. 647 (1921);

BRINKERHOFF-FARIS TRUST & SAVINGS COMPANY v. HILL, 281 U. S. 673; 74 L. Ed. 1107 (1929);

GRAHAM v. GOODCELL, 282 U. S. 409; 75 L. Ed. 415 (1931).

The effect of the Section 424 in depriving the Respondent of its remedy both as against the United States and as against the Collector who committed the wrong, is to impose upon the Respondent a heretofore non-existing tax liability. As the Petitioner phrases it, Congress evinced an intent to prevent the refund of these illegal taxes unless Respondent had "borne the economic burden of them," which is tantamount to saying that although the articles were not taxable in the first instance, yet if a like amount of money was collected from a purchaser, the tax liability is now imposed. The creation of this kind of retroactive liability is clearly a deprivation of property without due process, and is void under the Fifth Amendment to the Constitution;

UNITED STATES v. KLEIN, *supra;*
DANZER & CO., INC. v. GULF & S. I. R. Co., 268 U. S. 633; 69 L. Ed. 1126 (1924)

and see cases cited above.

This whole question has been so recently before this Court in the case of GRAHAM v. GOODCELL, *supra,* that the Respondent hesitates to further extend the argument. In that case the present Chief Justice, on page 426 of the Opinion, reiterated the general rule "that it is not consistent with due process to take away from a private party a right to recover the amount that is due when the Act is passed." The Court then points out that the exceptions to this rule are confined to those cases where the Congress corrected an administrative mistake, but at the same time did not retroactively create a liability where none existed before.

In the case at bar, whether or not an amount equal to the tax was "passed on" to the purchaser, no liability for the tax existed prior to the enactment of Section 424. In GRAHAM v. GOODCELL, *supra,* the taxes in question were valid from the beginning but their collection was illegal, because of the bar of the Statute of Limitations. Collection was enforced however, because of an administrative mistake and Congress in recognizing the right to recover these taxes provided that no recovery should be had where the taxpayer himself contributed to the running of the Statute of Limitations by obtaining a stay upon a claim in abatement. In the case at bar, there was

no defect in the administration of the law; the taxes were wholly illegal from the beginning; and there were no other facts to bring the case within the exception to the general rule as stated in GRAHAM v. GOODCELL, *supra,* and therefore it is clear that under this rule, Section 424 violates the constitutional provision in that it attempts retroactively to create a liability in relation to a transaction as to which no liability had previously attached. See FORBES PIONEER BOAT LINE v. BOARD OF COMMISSIONERS OF EVERGLADES DRAINAGE DISTRICT, *supra.*

If Congress did not have power to create retroactively a liability where no liability existed before the passage of the Act, as said in GRAHAM v. GOODCELL, *supra,* "it could not be concluded that Congress could accomplish the same result by denying to the taxpayers all remedy both as against the United States and also as against the one who committed the wrong." See the particularly apposite case of UNITED STATES v. KLEIN, *supra.*

The Petitioner's argument that if the manufacturer did "pass on" the excise tax to the purchaser, then the manufacturer, in maintaining his right to recover the amount of the tax, has no beneficial interest in it, is a specious argument, because as a matter of fact the tax is never passed on. Whatever the purchaser pays is the purchase price which he is willing to pay for the goods, while the excise tax is the manufacturer's obligation based upon that purchase price. This being so, the Commissioner, under the decisions

of this Court, must find that the taxes were not passed on to the purchaser.

LASH'S PRODUCTS COMPANY v. UNITED STATES, 278 U. S. 175; 73 L. Ed. 251 (1929).

Section 424, in attempting to take away existing rights, and to create retroactive liability, is so arbitrary and capricious as to amount to confiscation, and thus is undoubtedly void under the Fifth Amendment;

NICHOLS v. COOLIDGE, 274 U. S. 531; 71 L. Ed. 1184 (1927).

II.

1. AS TO PETITIONER'S CONTENTION THAT CHIEF USE IS DETERMINATIVE OF THE QUESTION AS TO WHETHER OR NOT THE RESPONDENT'S BATTERIES WERE PRIMARILY ADAPTED FOR USE IN AUTOMOBILES.

The Petitioner's argument upon this contention is that under the definition of "parts" laid down by the Treasury Department and by this Court, chief use of such article is determinative of the fact that the article was or was not primarily adapted for a particular use. This Court has denied this contention, and as will be demonstrated later in this brief, the principle has no application to the case at bar because the chief or principal use of the battery was not on or in connection with automobiles.

This Court in the case of UNIVERSAL BATTERY COM-

PANY V. UNITED STATES, 281 U. S. 580; 74 L. Ed. 1051 (1930), in clear and unmistakable language defined what was or was not a "part" under the pertinent Revenue Acts. In so doing, it adopted and approved the definition of the Treasury Department in its regulations as to what did or did not constitute "parts" under the Revenue Acts of 1921 and 1924, and at the same time it reiterated the earlier decisions of this Court upon which the definition of the Treasury Department was based. In his citation of it, the Petitioner has omitted a necessary part of this Court's decision in the Universal Battery case. What the Court said was:

> "The administrative regulations issued under Section 900 uniformly have construed the term 'part' in that Section as meaning any article designed or manufactured for the special purpose of being used as or to replace a component part of such vehicle, and which by reason of some characteristic is not such a commercial commodity as ordinarily would be sold for general use, but is primarily adapted for use as a component part of such vehicle. The regulations also have construed the term 'accessory' as meaning any article designed to be used in connection with such vehicle to add to its utility or ornamentation and which is primarily adapted to such use whether or not essential to the operation of the vehicle.
>
> "This construction of those terms has been adhered to in the Internal Revenue Bureau for about ten years and it ought not to be disturbed now unless it be plainly wrong. We think it is

not so, but is an admissible construction. Certainly it would be unreasonable to hold that articles equally adapted to a variety of uses and commonly put to such uses, one of which is use in motor vehicles, must be classified as parts or accessories for such vehicles.

"And it would be also unreasonable to hold that articles can be so classfied only where they are adapted solely for use in motor vehicles and are exclusively so used—Magone *v.* Wiederer, 159 U. S. 555, 559—We think the view taken in the administrative regulations is reasonable and should be upheld. It is that articles primarily adapted for use in motor vehicles are to be regarded as parts or accessories of such vehicles even though there has been some other use of the articles for which they are not so well adapted."

The definition of "parts" of the Treasury Department which this Court approved in the Universal Battery case appears in its Regulations No. 47 promulgated on May 1, 1919 (Appendix p. A-6) under Section 900 (c) of the Revenue Act of 1918 which levied an excise tax in identically the same language as in the Revenue Acts of 1921 and 1924. This definition is as follows:

"Art. 15. Definition of parts. A 'part' for an automobile truck, automobile wagon, other automobile, or motorcycle is any article *designed* or *manufactured* for the *special purpose* of being used as or to replace a component part of any such vehicle, and which by reason of some *peculiar characteristic* is *not such a commercial commodity as would ordinarily be sold for general*

> *use,* and which is primarily adaptable *only* for use as a component part of such vehicle." (Italics ours.)

Identically the same language was used in its Regulations No. 47, revised on December 27, 1920 (Appendix, p. A-7); its Regulations No. 47, revised on January 6, 1922, after the passage of the Revenue Act of 1921, (Appendix, p. A-8); and in its Regulations No. 47, revised in August, 1924, after the passage of the Revenue Act of 1924, (Appendix, p. A-9).

This Court in the Universal Battery case, *supra,* cited the case of MAGONE v. WIEDERER, 159 U. S. 555; 40 L. Ed. 258 (1895), upon which the Treasury Department obviously framed its definition of "parts." This Court said in that case:

> "If they (pieces of square, oblong or round glass with beveled edges) are articles, all, or one or more, as the case may be, which have no distinguishing characteristics, which are just as applicable for use in fancy boxes or in coach lamps as they are for clocks, just as applicable to the one use as to the other, then it would be entirely proper to say that they have no distinguishing characteristics as parts of clocks. They might be used for one purpose just as well as for another. And if you find as to those articles, or any of them, that they have several uses to which they are perfectly applicable, then as to those articles your verdict should be for the defendant." (Meaning that they would not be "parts" of clocks.)

The case of Magone *v.* Wiederer, *supra,* in turn cited the case of MAGONE v. HELLER, 150 U. S. 70; 37 L. Ed. 1001 (1893), which it had decided two years earlier, in which it was held, in effect, that if an article was widely, generally and commonly used for other purposes, it could not be held to be a "part" for an article for another use, even though in the majority of cases it was so used.

This Court has clearly defined a "part" under the pertinent Revenue Acts, and has again announced that if an article is equally adapted to a variety of uses and commonly put to such uses, it can not be a "part" for one of those uses, saying:

> "Certainly it would be unreasonable to hold that articles equally adapted to a variety of uses and commonly put to such uses, one of which is use in motor vehicles, must be classified as parts or accessories for such vehicles."

The Treasury Department itself had no quarrel with this definition, for as early as 1923 it applied its definition in the case of a spark plug and held that a spark plug was commonly, widely and generally used for a great many other purposes as well as in automobiles, and for that reason could not be held to be primarily adapted for use on the automobile. Exactly the same principle applies to storage batteries. For the convenience of the Court, the decision of the Treasury Department concerning spark plugs is set forth in the appendix to this brief on page A-19.

The District Court below made the following find-

ings which, as stated in the opinion of the Circuit Court of Appeals below, were supported by "a wealth of evidence," none of which was controverted:

> "That storage batteries, prior to their use on automobiles, were commercial commodities widely, generally and commonly sold for many different uses. (Fact Number 10, R-39.)
>
> "That the first storage batteries which were purchased for use on automobiles were the same in all essential respects as the batteries which had been commonly and widely used for a number of years for many other purposes. (Fact Number 11, R-39.)
>
> "That the automobile manufacturer adjusted the space in the automobile to fit the storage battery and the storage battery was not designed specially for use on the automobile. (Fact Number 12, R-39.)
>
> "That the parts of the electric storage batteries upon which the taxes in suit were paid were much the same as the parts of the storage batteries manufactured by the predecessors of the Plaintiff in 1895 or 1899, the only changes being those naturally due to the refinement in art of manufacture during that period and to competition in price. None of these refinements made the batteries peculiarly adaptable for use only on automobiles, but they continued to be equally adaptable for use on any device where the duty requirements were the same. (Fact Number 13, R-39, 40.)
>
> "That the storage batteries manufactured by the Plaintiff and upon which the taxes in suit were paid were commercial commodities which

were commonly, generally and widely manufactured and sold for a great many different purposes. There was no peculiar characteristic of these batteries which rendered them not such a commercial article as would ordinarily be sold for general use for a great many different purposes. (Fact Number 14, R-40.)

"That the uses of said electric storage batteries, other than the use on automobiles, were not incidental to the use on automobiles. (Fact Number 15, R-40.)

"That the storage batteries manufactured by the Plaintiff, and upon which the taxes in suit were paid, were not peculiarly adaptable only for automobiles, but were equally well adaptable for use in stationary engines, marine engines, tractors, radio, and for a great many other purposes where the duty required was the same, and were so used. Nor were they primarily adaptable for use only on automobiles. They were interchangeable for use in connection with automobiles or for use in connection with a great many other devices where the duty requirements were the same. (Fact Number 16, R-40.)

"That the storage batteries manufactured by the Plaintiff, and upon which the taxes in suit were paid, were not designed for the special purpose of being used on automobile trucks, automobile wagons, or other automobiles, but were designed for use also for uses in other fields in which electricity in portable form was required. The duty required for use in automobiles was also required in various other uses, and the batteries which were applied to these other uses

were identical in design with the batteries used in connection with automobiles. Said batteries were just as applicable for one use as for another where the duties required were the same. (Fact Number 17, R 40.)"

It thus appears that every factor in the definition laid down by this Court as to what does not constitute a "part" has been fully satisfied, and that the Respondent's storage batteries were clearly not "parts" for the automotive vehicles described in the pertinent Revenue Acts.

Storage batteries of the same kind and used for the same purposes, under similar findings of fact, have been held not to be "parts" in the following cases:

PHILADELPHIA STORAGE BATTERY COMPANY V. LEDERER, 21 Fed. (2d) 320 (1927), in which no appeal was taken from the verdict of the District Court and the judgment has been paid.

YALE STORAGE BATTERY COMPANY V. UNITED STATES, 313 CCH 8827 (1930), in which no appeal was taken from the judgment of the District Court.

MCCAUGHN V. ELECTRIC STORAGE BATTERY COMPANY, 63 Fed. (2d) 715 (1933), in which no appeal was taken from the affirmance by the Circuit Court of Appeals of the Third Circuit of the judgment of the District Court.

GENERAL LEAD BATTERIES COMPANY V. UNITED STATES, Ct. Cls., (1932) 60 Fed. (2d) 177.

UNITED STATES LIGHT & HEAT CORP. V. UNITED STATES, 3 F. Supp. 861 (C. Cls., 1933).

ENGLERT MFG. CO. v. UNITED STATES, 3 F. Supp. 873 (C. Cls., 1933).

UNIVERSAL BATTERY CO. v. UNITED STATES, 3 F. Supp. 878 (C. Cls., 1933).

M. & M. CO. v. UNITED STATES, 3 F. Supp. 886 (C. Cls., 1933).

All Courts have consistently followed the decision of this Court in the Universal Battery case, *supra*. The definition which was laid down by this Court was applied consistently in cases which arose before the decision in the Universal Battery case. As stated by the Court of Claims in the case of GENERAL LEAD BATTERIES COMPANY v. UNITED STATES, *supra*, the two cases cited by the Petitioner in his brief, to wit, COLE STORAGE BATTERY COMPANY v. UNITED STATES, 65 Ct. Cl. 164, and EDISON STORAGE BATTERY COMPANY v. UNITED STATES, 67 Ct. Cl. 543, were not inconsistent because in each of those cases there was no finding that the batteries were equally adapted for use other than on automobiles, or were, in fact, so used, but on the contrary the findings were that they were primarily designed and primarily adapted for use only on automobiles, and in each case the taxpayer contented himself with showing only that they "might" have been used for other purposes.

The quotations from the decision of the Circuit Court of Appeals for the Sixth Circuit in the case of WEIR v. MCGRATH, 41 Fed. (2d) 1021 (1930) cited in the Petitioner's brief on pages 15 and 19, do not correctly set forth the rule of construction

of that Court. A reading of the whole opinion discloses that the principle laid down is exactly that for which the Respondent contends, and which this Court announced a year later in the Universal Battery case, *supra*.

The findings of the Court below being full and complete that the Respondent's storage batteries were widely, commonly and generally sold for a great many other purposes and were, in fact, so used, and that such other uses were not incidental to use on automobiles, and these findings being supported by overwhelming evidence, none of which was controverted, it is submitted that the judgment of the Court below must be affirmed.

2. THE RULE OF CHIEF USE DOES NOT APPLY TO THIS CASE.

The Petitioner's argument is that the Court should take judicial notice that the principal use of these storage batteries was on automobiles, and that the evidence shows that such was the principal use. In the first place, the Court can not take judicial notice of such fact, because the chief use was not on automobiles; and secondly, as hereinafter pointed out, the evidence in the case at bar demonstrates that the chief use was not on automobiles.

Chief or principal use of an article under the pertinent Revenue Acts has no application in cases where it is found that there is wide, general and common use and equal adaptability. This is what this Court

said in the Universal Battery case, *supra;* is exactly what the Treasury Department said in the definition in its Regulations; and, more specifically, this is what this Court said in the case of MAGONE v. HELLER, *supra.* In that case, the Tariff Act of 1883 imposed duties on compounds of potash, and among the articles upon the free list were "all substances expressly used for manure." The question was whether the common use, which we contend meant principal use, of the plaintiff's article was for manure. The Court in holding that if it was commonly and generally used for other purposes, *even though the principal use was for manure*, it could not be held to be used expressly for manure, said:

> "If the only common use of a substance is to be made into manure or to be itself spread upon the land as manure, the fact that occasionally or by way of experiment it is used for a different purpose will not take it out of the exemption. But if it is commonly, practically and profitably used for a different purpose, it can not be considered as 'expressly used for manure,' even if in the majority of instances it is so used."

This Court in the case of MAGONE v. WIEDERER, *supra,* in commenting upon the foregoing case, said:

> "It follows that whilst Magone *v.* Heller adhered to the settled rule of chief use, a guide was there announced by which to discover whether the facts established such chief use. *Chief use in itself is a vague and uncertain term.*" (Italics ours.)

As pointed out by this Court, therefore, the concept of chief use has no application if it be found that the article is equally adapted for other uses, and is widely, commonly and generally put to such uses, and that such other uses are not incidental to use on automobiles.

It is submitted that the rule of chief or principal use has application only in those cases construing the Tariff Acts where duties are imposed upon articles which by the language of the Acts themselves are "used for" or "used expressly for" or some other similar language which clearly imports chief use. Thus the Petitioner's suggested application of the rule of chief use is not proper in this case.

Under the facts, Petitioner's argument must also fall, because the Court below found that the other uses of Respondent's batteries were not incidental to use on automobiles. (Finding Number 15, R-40.) The whole burden of the Petitioner's argument is based on his statement that the other uses were "diverted from" or "incidental to" use on automobiles, but this is clearly not so and the Court below refused the Petitioner's request to find that the principal or chief use of the batteries was in automobile trucks and other automobiles. (Request Number 14, R-20; Refused R-21.)

The refusal of the District Court to make the finding requested by Petitioner that chief use of Respondent's batteries was upon automobiles is amply supported by uncontroverted testimony of Respondent's

retail dealers, who stated that their sales during the taxable period of Respondent's batteries of the types actually used upon automobiles were made in greater quantities for radio or marine use than for use on or in connection with automobiles. For instance, one dealer stated that "Our radio business overcame our other uses." (R. 78), and another dealer stated that "During the years 1922 to 1926 about seventy-five percent of my business in the sale of 'SLI' type of Willard batteries was for other use than for use in automobiles and automotive trucks. They were used principally in the motor boat fields, marine and the radio" (R. 80).

It will be remembered that a storage battery is an apparatus for storing electricity in chemical form and discharging it in electrical form. It consists of a jar of glass or rubber containing positive and negative cells consisting of plates immersed in a solution of sulphuric acid. No matter what the size of the cells may be, each cell produces two volts of electricity, so that the sole criterion as to the number of cells, size and shape of the battery is the duty required of it (R-35, 36, 37), and is applicable for every use where electricity in portable form may be required. The sole duty required of it is the number of volts which it releases and the rate of discharge of such current, and the former depends on the number of cells and the latter on the size of the plates. (R-35, 36, 37.)

The Court has found upon "a wealth of evidence"

that storage batteries were in wide, commor and general use before automobiles were invented, and that they were first applied to automobiles in about 1912 or 1913, and they continued to be used after that time for an ever increasing number of purposes other than automobiles; in fact, wherever electricity in portable form was used. To refute the inferences to be drawn from the Petitioner's statement that the evidence shows that the principal use of the batteries was on automobiles would require a discussion of the entire evidence, which is beyond the legitimate confines of this brief. For the convenience of the Court, however, there is set forth in the appendix to this brief on page A-20 a statement of the various uses, some 92 in number, with the references.

To request the Court to take judicial notice that the principal use of storage batteries is on automobiles is absurd. The fact remains that the Court, on the contrary, would have to take judicial notice of the fact that the principal use was *not* on automobiles, and that storage batteries were a commercial commodity widely, commonly and generally used long before automobiles were invented, and that when the automobile first used them to any extent, the automotive industry adopted a commercial commodity and adapted its automobile to the storage battery. (Finding Number 12, R-17.)

The Respondent concedes that words in a tax statute should be given their ordinary and commonly understood meaning, but at the same time in a tax

statute the Court has no power to inquire into the intent of Congress but must adhere to the fundamental principle that only those things can be taxed which by the statute are specifically made the subject of the tax, and that the provisions of a taxing statute shall not be extended by implication beyond the language used.

UNITED STATES v. MERRIAM, 263 U. S. 179; 68 L. Ed. 240 (1923);

GOULD v. GOULD, 245 U. S. 151; 62 L. Ed. 211 (1917);

UNITED STATES v. CARROLL CHAIN COMPANY, 8 Fed. (2d) 529 (1925).

3. AS TO THE EFFECT OF THE REVENUE ACT OF 1932.

The Revenue Acts of 1921 and 1924 were repealed by the Revenue Act of 1926, and the Revenue Act of 1932 was passed six years after the repeal of the former Acts. The Petitioner argues that because the Revenue Act of 1932 imposes a tax upon the sales price of storage batteries, *eo nomine,* "suitable for use on" automobiles, there was evidenced an intention by Congress that the phraseology used in the former Revenue Acts intended to make storage batteries taxable as "parts" for automobiles. But the well settled rule of law produces an exactly opposite result, because it requires the construction that by specifically describing an article in the later Act, Congress recognized that the article so described was

not subject to tax liability in the earlier Act, and intended to change the earlier Act.

United States v. Woodruff, 175 Fed. 776 (1909);

Brewster v. Gage, 280 U. S. 327, 74 L. Ed. 457 (1930).

It is respectfully submitted that the judgment of the Court below should be affirmed.

Respectfully submitted,

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PHILIP DECHERT.